No. 12,534

IN THE

United States Court of Appeals

For the Ninth Circuit

WINSTON CHURCHILL HENRY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The District Court had jurisidiction of the trial of this case under 18 U.S.C., Section 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction, a timely appeal was taken, and jurisdiction of this Court to review the judgment of the District Court is given by 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

The appellant was indicted on September 15, 1949 on two counts. The first count charged violation of 26 U.S.C., Section 2553(a), in that the appellant "did

knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of cocaine leaves, to wit, 250 capsules of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package."

The second count charged a violation of 26 U.S.C., Section 2593(a), in that the appellant "being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U.S.C., did knowingly, wilfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of marihuana and 35 marihuana cigarettes without having paid such tax."

Appellant was tried by a jury and found guilty on January 12, 1950. (R. 27.) He was sentenced to imprisonment for four (4) years and to pay a fine of $1,000.00 on the first count; and two (2) years imprisonment with a fine of $1,000.00 on the second count, the sentences of imprisonment to run concurrently.

On July 12, 1949, William K. Wells, a Federal Narcotic Agent, procured a search warrant directing him to search "a two-story stucco building located at 803 Hausten Street, Honolulu, T.H., said two-story stucco building is painted white with green awning and is the second building in the rear of 803 Hausten Street." (R. 65-67.)

On July 16, 1949, Mr. Wells, in company with several other officers, waited in a building at 807-B Haus-

ten Street, from which they could observe the building at 803 Hausten Street. (R. 258, 273, 370.) About 12:30 p.m. they saw the appellant, Henry, come around the side of the building at 803 Hausten Street and approach an automobile, whereupon, they proceeded to approach the appellant, Henry, at which time Mr. Wells informed the appellant that he had a search warrant to search the premises. The officers, in company with appellant, then approached the building in the rear of 803 Hausten Street and the appellant called to someone inside to open the door. (R. 371.)

Mr. Wells and the officers then proceeded to search the premises. A bottle containing 915 capsules filled with a substance later found to be heroin was found under one of three flagstones in a pathway back of the rear house. (R. 263-264, 267, 270.) A small bottle containing a substance later found to be cocaine was found under a pillow on a sun couch in a patio about 15 feet from where the first bottle was found. (R. 298-299, 309-310, 313.) A box containing 29 cigarettes and a brown paper bag containing a substance found to be marihuana was found jammed between a window screen and a shade on the outside of the building in the rear. (R. 321-323.) Six marihuana cigarettes were found under a sofa in the living room of the house. (R. 327, 334-335.)

It is conceded in appellant's brief that none of the articles discovered in the search bore the necessary narcotic tax paid stamps, and that appellant, upon demand, failed to produce the necessary order forms

respecting marihuana required by 26 U.S.C., Section 2591.

Appellant was placed under arrest 30 or 40 minutes after the search began which was after the two (2) bottles had been discovered. (R. 371, 384-385.)

Six specifications of error are made by appellant each of which will be dealt with separately.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.

The appellant conceded in his brief that there was enough evidence to support a finding that some quantity of heroin and cocaine were on the premises at 803 Hausten Street. It is further conceded that there was enough evidence to support a finding of the absence of appropriate tax paid stamps from the drugs found in the search. We agree that the primary question here is whether such drugs were found in the possession of the appellant.

It is true that Officer Case stated he had instructions to observe appellant's residence at 408 Keanianu Street. As a matter of law, a person may have two residences. *Zebert v. Hunt,* 108 Fed. 449. It is true that the premises at 803 Hausten Street were registered to Helen Thomas at the Rent Control Office at Honolulu, T.H., but this has nothing to do with

whether or not appellant, Henry, was in possession of narcotics at the time of the raid.

The government relies on the following acts and admissions of the appellant to show that he was in possession of the drugs:

1. "Henry called to someone to open the door." (R. 371.)

2. "Wells asked if Henry wanted the search warrant read to him" and Henry replied, "No, Billy." (R. 371.)

3. Wells stated he searched the bedroom "occupied by the defendant." (R. 372.)

4. Wells tasted the contents of the bottle and Henry stated, "Man don't do that! Billy, that's dynamite." (R. 378.)

5. Wells said to the appellant, "This bottle must contain about 200 grains." The appellant replied, "No, more than that." (R. 378.)

6. After the arrest the appellant told Helen Thomas to produce the key to the locked closet, which she did. (R. 376.)

7. After the arrest Wells asked the appellant how long he had lived there and Henry replied, "Oh, not very long." (R. 376.)

8. Wells, in referring to a loose panel in the closet, asked the appellant about it, whereupon Henry stated it was there before he moved in. (R. 376.)

9. After the arrest the appellant, referring to Helen Thomas, told Wells, "Billy, you don't have to take her down; she doesn't know anything about the stuff." Wells replied, "Well then, is it your stuff?" Thereupon, Henry "just smiled and didn't reply." (R. 383.)

10. At the Police Station, appellant stated, "I am responsible for everything that was found on the premises" and further stated that he had lived at 803 Hausten Street for about two (2) months prior to the arrest. (R. 413.)

It is maintained in appellant's brief that all the foregoing acts or admissions are uncorroborated in the record. The foregoing statements or acts are not confessions. They are either inculpatory statements or acts evidencing guilt and as such do not have to be corroborated. The appellant did not, in any of the foregoing admissions, expressly admit guilt of the crime, any more than he did at the trial.

Appellant's brief cites *Forte v. U.S.,* 94 F. (2d) 236. That case had to do with rules governing reception in evidence of extrajudicial *confessions.* The difference between *confessions* and admissions by the appellant is made clear in *Ercoli v. U.S.,* 131 F. (2d) 354, which case comments on the *Forte* case:

> "In the Forte case we stated the applicable rule covering the reception in evidence of extrajudicial *confessions.* In the present case Appellant's statements to the officers were admissions made by the Appellant as exculpatory statements, rather than confessions. He did not in

those confessions admit guilt of crime, any more than he did in his testimony at the trial. The rules governing the reception in evidence of such admissions are much less onerous than those concerning confessions." *Ercoli v. U.S., supra.*

Wigmore, Third Edition, Section 821, contains a discussion of the question presented here.

"What is a confession? A confession is *an acknowledgment in express words,* by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part* of it. It is to this class of statements only that the present principle of exclusion applies. In this sense, therefore, there are in particular three things which fall *without* the meaning of the term 'confession', and are thus not effected in any way by the present rule, namely, 1. Guilty conduct, 2. Exculpatory statements, and 3. Acknowledgments of subordinate facts colorless with reference to actual guilt." (Italics supplied in part.)

Also, in *Perovich v. U.S.,* 205 U.S. 86, 27 S. Ct. 456, is the following holding:

"Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, *there is no reason why they should not have been received."* (Italics supplied.) *U.S. v. Larkin,* 26 Fed. Cas. 866, No. 15,561; *Wine v. U.S.,* 260 Fed. 911, certiorari denied, 253 U.S. 484, 40 S. Ct. 481; *Miller v. U.S.,* 53 F. (2d) 316.

It is apparent from all of the foregoing that the trial Court very properly allowed the jury to consider the statements or acts of the appellant since they are mere admissions and not confessions, and therefore, corroboration is not necessary. Further, certainly such admissions are of sufficient weight to have enabled the jury to find as a fact that the appellant was in possession of these drugs. Moreover, the Corpus Delicti was proven when it was shown that there were narcotic drugs on the premises without the necessary tax paid stamps, and the presence of such drugs is admitted by appellant. Thereafter, even a confession would have been admissible.

SPECIFICATION OF ERROR NO. 2.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SECOND COUNT OF THE INDICTMENT.

This specification of error is based upon the same ground as the first one, that is, that the acts and admissions of the appellant were improperly admitted, and what has been said with reference to the first specification is equally applicable here.

SPECIFICATION OF ERROR NO. 3.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT FOR THE NECESSARY ORDER FORMS WITH REGARD TO POSSESSION OF MARIHUANA.

Mr. Patterson, a Deputy Collector of Internal Revenue, testified that he made demand on appellant for the order forms mentioned in Title 26, Section 2593, U.S.C., on September 27, 1949. The appellant was indicted on September 15, 1949, and this specification of error alleges that, since demand was made after indictment, it comes too late.

A complete answer to that contention is found in *Cratty v. U.S.*, 163 F. (2d) 844, in which the identical question is presented. In the *Cratty* case the demand for the order forms was made on the morning of the trial and the same objection was made there as is made here. The Court stated that the objection was without merit as it could not be presumed that there was no other competent evidence before the grand jury of nonpayment of the tax.

SPECIFICATION OF ERROR NO. 4.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OR ADMISSIONS, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AND WAS NOT ACTING FREELY AND VOLUNTARILY.

There is *no* evidence in the record that the appellant was under any restraint whatsoever. All the

testimony shows that the appellant was acting freely and voluntarily. The only testimony from which even an inference of restraint could be drawn is the testimony of Mr. Wells on cross-examination, wherein he stated that he "required" the appellant to accompany him. On redirect-examination a discussion of the word "required" occurred, and at that time Mr. Soares, one of the attorneys for appellant, agreed that there was nothing significant to the word "required," and that it was equivalent to "merely asking" the appellant to accompany Mr. Wells. (R. 388.) Other than this, there is not so much as one word of proof that the appellant was under any restraint at any time.

Merely because the appellant was under arrest at the time some of the acts were committed or admissions were made does not render such acts or admissions incompetent. *Pierce v. U.S.*, 160 U.S. 355.

> "Over objection of counsel for defendant, testimony was given by officers as to the conversations had with the defendant after his arrest. The statements were not confessions, but at most admissions against interest. In the federal courts there is no presumption against the voluntary character of a confession, and the burden is not on the government in the first instance to show its voluntary character. Gray v. United States (C.C.A. 9) 9 F. (2d) 337; Wigmore on Evidence (2d Ed.) § 860. The mere fact that defendant was under arrest did not render inadmissible the statements which he made. Ziang Sung Wan v. United States, 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131; Pierce v. United States,

160 U.S. 355, 16 S. Ct. 321, 40 L. Ed. 454. The admissibility of such evidence depends largely upon the circumstances connected with the statements, and the matter is largely to be determined by the trial court. There is nothing in the evidence indicating that the statements were not voluntary, and hence they were admissible." *Hartzell v. United States,* 72 Fed. (2d) 577.

Neither at the trial nor in the brief was any contention made that the arrest was illegal.

SPECIFICATION OF ERROR NO. 5.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION, THE MOTION BEING MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

An examination of the record will show that the conversation complained of between appellant and Officer Kinney was freely and voluntarily made and that it was a general conversation. The appellant stated that he was responsible for everything in the premises at 803 Hausten Street and that he had lived there two (2) months. Even if Officer Kinney had been referring only to guns, which we do not concede, the appellant was certainly talking about "everything" in the premises. Kinney stated that he was asking questions of the appellant in general, and that the appellant was answering questions in general, and that the statement of the appellant was given voluntarily by him. (R. 419-420.)

SPECIFICATION OF ERROR NO. 6.

THE TRIAL COURT DID NOT ERR BY REFUSING A TRANSCRIPT OF THE INSTRUCTIONS AND BY GIVING FURTHER ADDITIONAL INSTRUCTIONS WHEN REQUESTED BY THE JURY.

The Court's charge was eminently fair, just and reasonable; it neither overstated the case of the government nor understated the case of the appellant. No less than seven (7) separate times the Court charged the jury that it was their province and theirs alone to evaluate the evidence and that they must disregard any opinion that they think the Court might have. (R. 442-443, 478, 486, 489, 493, 495.) We quote the last admonition made by the Court in his charge of additional instructions after having been requested by the jury for such instructions:

> "As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so satisfied you must acquit." (R. 495.)

CONCLUSION.

It is respectfully submitted that the trial Court did not err in any matter brought before it in the trial of this case, and that judgment of that Court should be affirmed.

Dated, Honolulu, T.H.,
September 29, 1950.

Respectfully submitted,

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